IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-868

LARRY JAMES,

Appellant,

vs.

THE STATE OF ILLINOIS,

Appellee.

On Appeal from the Appellate Court of Illinois,
Second Judicial District

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTION

The Appellant herein respectfully appeals from the adverse judgment described below and submits this Jurisdictional Statement to show that the Supreme Court has jurisdiction of the appeal; that this appeal presents substantial federal questions which should be given plenary consideration, and therefore Appellant prays this Honorable Court give plenary consideration, with briefs on the merits and oral argument, to resolve these questions.

OPINION BELOW

The judgment from which this appeal is taken is that of the Appellate Court of Illinois, Second Judicial District, which is reported at 38 Ill. App.3d 594, and 348 N.E.2d 295 and is appended herein as Appendix A. The decision of the Supreme Court of Illinois denying Appellant leave to appeal is reported at ..... Ill.2d ..... and is appended herein as Appendix B.

The holding concerning the Constitutional question presented is based upon the decision of The Supreme Court of Illinois in the case of *People v. Mayberry*, 63 Ill. 2d 1, 345 N.E.2d 97 (1976), and that decision relies on the opinion in the case of *United States ex rel. Daneff v. Henderson*, 501 F.2d 1180 (2d Cir. 1974). Copies of these opinions are herein appended as Appendix C and Appendix D respectively.

JURISDICTION

The instant case is to challenge the constitutionality of Illinois Revised Statutes, Chapter 56½, section 1401(a). The Appellant, following a jury trial, was convicted and sentenced to four (4) years to four (4) years and one (1) day in a penitentiary under this statutory provision. Appellant extensively challenged the constitutionality and validity of the above cited State Statute during his trial in the Circuit Court of Kane County, in his appeal to the Appellate Court of Illinois, and in his Petition for Leave to Appeal to the Supreme Court of Illinois.

This appeal is from the final judgment of the Appellate Court of Illinois, Second Judicial District, entered on the 26th day of May 1976. Leave to Appeal this decision to the Supreme Court of Illinois was denied on the 29th day of September, 1976. Notice of Appeal to this Court was filed on the 9th day of December, 1976, with the Appellate Court of Illinois, Second Judicial District, the court then possessed of the record. A copy of this Notice is appended as Appendix F.

Jurisdiction of this court is conferred by 28 U.S.C. Sec 1257(2).

Cases believed to sustain jurisdiction of this court are *Minneapolis, St. Paul, and Sault Ste. Marie Railway Co. v. Rock*, 279 U.S. 410 (1929) and *Panhandle Eastern Pipe Line Co. v. Calvert*, 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396.

STATUTORY PROVISION INVOLVED

The statutory provision involved is Illinois Revised Statutes, Chapter 56½, Section 1401(a) which in relevant part states:

> . . . it is unlawful for any person knowingly to manufacture or deliver . . . a controlled substance. Any person who violates this section with respect to:
>
> (a) The following controlled substances and amounts, . . . is guilty of a Class 1 felony . . .
>
> (7) 300 grams or more of any substance containing . . . (v) 3,4,5-Trimethoxyphenethylamine (mescaline) other than peyote.
>
> (8) 30 grams or more of any substance containing lysergic acid diethylamide (LSD).

(Full text of Statute is reproduced as Appendix E)

QUESTIONS PRESENTED

I

Whether the statute under which the defendant was tried, convicted, and sentenced is repugnant to the equal protection and due process clauses of the Constitution of the United States on its face and as applied to the defendant.

II

Whether the statute under which the defendant was tried, convicted, and sentenced is unconstitutionally vague and ambiguous on its face and as applied to the defendant in this case.

STATEMENT OF THE CASE

Appellant, Larry James, was charged by sealed indictment with the offense of Unlawful Delivery of a Controlled Substance, in violation of Chapter 56½, Section 1401(a) of The Illinois Revised Statutes, as amended, in that he knowingly delivered more than thirty (30) grams of a substance containing Lysergic Acid Diethylamide (LSD). The case was tried before a Jury after which the Appellant was convicted and sentenced. An appeal was perfected in the Appellate Court of Illinois, Second Judicial District, which Court affirmed the judgment of the trial Court, and thereafter Appellant petitioned the Supreme Court of Illinois for leave to appeal. After the case was duly docketed in that Court, which is the highest court of the State of Illinois, leave to appeal, was denied on September 29, 1976 and from the above, Appellant takes this Appeal.

Facts relevant to this appeal are undisputed and clearly set forth in the record. The Constitutional validity of the Statute was first drawn in question prior to trial when Appellant presented a written pretrial Motion challenging the constitutionality of the statute under which he was charged. The Court stated it would hear the motion later in order not to delay jury selection. Thereafter, during the course of the trial, the Appellant presented his written pretrial motion challenging the constitutionality of the statute, part of which stated that the statute violated the due process and equal protection clauses of the Constitution of United States. Following a hearing the Court denied the motion, but stated it was subject to possible further consideration. At the close of the State's case, the Appellant presented a written motion for Directed Verdict of Acquittal and in this

motion renewed the pretrial motion pertaining to the constitutionality of the statute, and following argument, the Court denied the motion.

Appellant again challenged the constitutionality and validity of the statute under which he was tried in his written post trial motion for Acquittal or New Trial by renewing his prior motions and again charging that the statute violated the 14th Amendment to the Constitution of the United States. Following a hearing, the motion was denied.

Reference to the above mentioned motions and hearings presented in the Trial Court are evidenced in the parts of the record designated below:

	Common Law Record	Transcript Or Report Of Proceedings	Abstract Of Record[1]
	Page	*Page*	*Page*
Pretrial Motion Challenging Constitutionality	48-50		2
Hearing on Motion		83-90	8
Motion For Directed Verdict of Acquittal	47		2
Hearing on Motion		109-112	11
Post Trial Motion For Acquittal Or New Trial	66-69		3
Hearing on Motion		150-166	12

The constitutionality and validity of the Statute was again drawn in question when raised in the appeal to the Appellate Court of Illinois in Appellant's brief, and that court disposed of the issue by sustaining the statute as constitutional in its opinion which is herein reproduced as Appendix A.

[1] Refers to Appellate Court abstract.

Appellant's Petition for Leave to Appeal to the Supreme Court of Illinois again drew in question the constitutional validity of the state statute, and the State Supreme Court disposed of the issue by its order (Reproduced as Appendix A) denying leave to appeal.

THE QUESTIONS ARE SUBSTANTIAL

Chapter 56½, Section 1401, of the Illinois Revised Statutes provides that it is unlawful for one to knowingly manufacture or deliver certain controlled substances, but the classification of whether one is guilty of a Class One felony[1] [section 1401 (a)] depends on weights of substances containing certain controlled substances. Two examples are that one is guilty of a Class One felony who knowingly manufactures or delivers 30 grams or more of a substance containing Lysergic Acid Diethylamide (LSD) [Ch. 56½, Section 1401 (a)-(8)] or 300 grams or more of a substance containing Mescaline other than Peyote [Ch. 56½, Section 1401 (a)-(7)-(V)). The severity of the penalty under this language is based not upon the amount of a controlled substance, but rather upon the amount of the substance that contains a certain controlled substance.

This method of determining penalties requires the Appellant in this case, who delivered less than one-half gram of LSD (the chemist testified at trial that less than one (1) percent of the 44.1 grams of substance was LSD [A-9] to be convicted of a Class One felony and sentenced to a minimum of four years in a penitentiary while another person who delivered fifty (50) times the amount

[1] Under Illinois law, class one felonies carry penalties of four years to an indeterminate time and are the most serious crimes in Illinois aside from Murder which is a separate class felony. This, and certain other class one felonies are not probationable.

of LSD in a pure state would be guilty of a lesser class felony and thus would draw lesser penalties.

Whether this method of attaching disproportionate penalties for two people similarly situated violates the due process and equal protection clauses of the United States Constitution and constitutes an arbitrary classification is a substantial question as pertains to this Appellant and others similarly situated.

The Controlled Substance Act of Illinois, Illinois Revised Statutes, Chapter 56½, utilizes a classification system based upon "substances containing controlled substances" to determine all narcotic offenses which are Class One felonies and further uses this method in determining all penalties and sanctions with regard to all violations concerning Cannabis. The fact that this classification system is used in a State such as Illinois, thus affecting so many defendants, shows the question is substantial and a decision by this Court would have a far reaching effect.

Another question raised by Appellant, assuming *arguendo* that the classification system itself is constitutional on its face, is the statute unconstitutional *as applied* to the Appellant under the particular facts in this case? Appellant submits that the right to liberty is a fundamental right protected by the Constitution. The four year penitentiary term he now faces would deprive him of this sacred and substantial right which in itself is substantial enough to merit a plenary consideration of the matter.

The Appellant argued in his brief to the Appellate Court of Illinois and in his Petition for Leave to Appeal to the Supreme Court of Illinois the holding of this Court in the case of *Skinner v. Oklahoma*, 316 U.S. 535 (1972). In *Skinner*, this Court considered the penalty

provided by an Oklahoma statute which authorized sterilization of persons who had been previously convicted of two felonies involving moral turpitude and who were thereafter convicted in that State of a third felony involving moral turpitude. The defendant, Skinner, was three times convicted of stealing, which according to the Oklahoma statute involved moral turpitude, once for stealing chickens and twice for robbing with firearms. Thereafter, sterilization proceedings were instituted and an order for sterilization entered. This Court took notice that under Oklahoma law, the crime of embezzlement was not classified as involving moral turpitude and the Court held that such a classification violated the Constitution.

This Court said (316 U.S. at 541-542):

> . . . The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." (Citing case.) When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. (Citing cases.) Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination . . . In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. (Citing case.) . . .

The Appellant further argued that the statutory scheme in Illinois in this case involving Larry James in one respect goes a step beyond the following language of the Skinner case, "When the law lays an unequal hand on those who have committed intrinsically the same

quality of offense" and punishes one more severely than another "it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." In the instant case, the law lays an unequal hand not only on one who commits intrinsically the same quality of offense but also on one who commits a lesser quality offense. Larry James delivered less than one-half gram of LSD, and because it was mixed with over 30 grams of a harmless substance, he gets a stiffer penalty than one who delivered over fifty times that amount of LSD in a pure state.

This argument raises several subsidiary questions which in themselves are substantial. Appellant reasoned that the delivery of fifty times the amount of the same harmful substance cannot reasonably be classified in such a way as to draw a *lesser* penalty, since United States Supreme Court cases have held that classifications must be so that all persons similarly circumstanced shall be treated alike. Further, that in considering classifications which affect fundamental rights, there is no presumption of validity and that the State must show a compelling state interest that cannot be accomplished in a more reasonable manner than the classification scheme which is challenged. The Appellate Court did not address this issue but only stated the classification was sustained by the Illinois Supreme Court in *People v. Mayberry* (Opinion in *Mayberry* reproduced as Appendix C.) These questions were raised in Appellant's brief to the Appellate Court. These questions were also raised in Appellant's Petition for Leave to Appeal, which in addition pointed out the following language of the Illinois Supreme Court in *People v. Mayberry*:

> . . . the defendants have not demonstrated that a classification scheme based upon the amount of pure drug contained in a given substance would be feasible. We therefore conclude . . .

Appellant further argued that the burden is still upon the State to show a better scheme impossible, that Appellant, Larry James, did point out in his Reply Brief to the Appellate Court that the Federal Classification System eliminates the pitfalls of the Illinois System and indicated the criteria the Federal Government uses to determine the seriousness of drug offenses, thus showing that a classification scheme eliminating the Illinois pitfalls is feasible. Appellant maintains that it is a substantial question whether the burden of overcoming a presumption of validity of a classification is placed upon a defendant or whether, in cases involving one's fundamental rights such as liberty or religious freedoms, the burden is on the State to justify the reasonableness of the classification. Appellant submits, and has continuously argued, that in cases involving fundamental rights, the burden is upon the State to show validity or reasonableness. Appellant submits that it is, or at least should be, beyond the power of the Illinois Appellate Court and the Illinois Supreme Court to, in essence, rule against this principle of law by not addressing the issue when it is clearly presented as it was in this case.

The Supreme Court of Illinois had earlier addressed itself to the question of the presumption of validity of classifications and in the case of *Hoskins v. Walker*, 57 Ill.2d 503, 315 N.E. 2d 25 (1974), discussed challenging the statute to establish constitutional invalidity, as opposed to classifications which affect fundamental rights. The language of the Court at 315 N.E. 2d 27 states:

> Tested by traditional principles a classification will be sustained if there is a reasonable basis for distinguishing the class to which the law is applicable from the class to which it is not. In such cases there is a presumption favoring the validity of the

legislative classification and the burden is on the party challenging it to establish its invalidity. (*People v. McCabe*, 49 Ill. 2d 338, 340-341, 275 N.E. 2d 407.) In considering a classification which affects fundamental rights no such presumption of validity prevails and the classification will be sustained only if it is justified by a compelling State interest. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583; *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169.

On the other hand, in *Mayberry*, the Illinois Supreme Court said:

> In determining whether a statutory classification violates the equal protection clause, we presume that the classification is valid and place the burden of showing invalidity upon the party challenging the classification. A classification scheme will be upheld if any state of facts may reasonably be conceived which would justify the classification. It is only required that there be a reasonable basis for distinguishing between the classes created by the legislation (*People v. McCabe*, 49 Ill. 2d 338, 275 N.E.2d 407.)

Thus, the Illinois Supreme Court changed the fundamental right standard it applied in *Hoskins v. Walker* in its present findings in *Mayberry*. Further, the language quoted from *Hoskins v. Walker* above, was cited both to the Appellate Court in Appellant's brief and to the Illinois Supreme Court in the Petition for Leave to Appeal. Neither time was the argument acknowledged, let alone addressed or answered. Appellant submits that what the respective burdens are in such cases creates a substantial question and should be answered.

The Supreme Court of Illinois in the opinion of *People v. Mayberry* relied on the case of *United States ex rel. Daneff v. Henderson*, 501 F. 2d 1180 (2d Cir. 1974) to

support its reasoning. One substantial difference between the opinions in those two cases was that in *Daneff*, the Court at least addressed itself to inequities that could result under the Classification System and acknowledged the possibility of extreme cases. The next to the last paragraph of the *Daneff* opinion (See as Appendix D) presented an example of a severe inequity and acknowledged the problem stating:

> "To the extent these extreme examples are not themselves handled by prosecutorial discretion, the rulings of the New York courts, or the exercise of more perspicacious legislative insight, we leave their resolution to the day when they are presented to us."

Appellant James pointed out the extreme example as it affected him, (he delivered less then one-half gram of LSD and one who delivered fifty times that amount in a pure state can be placed on probation, while Appellant must face a minimum four year prison term) yet neither prosecutorial discretion nor rulings of the Illinois Courts addressed or recognized this extreme case, notwithstanding the fact that the inequity was pointed out by Appellant at all levels of proceedings. In the instant case, a quantitative analysis by the Drug Enforcement Administration shows that James is injured or prejudiced by the enforcement of the Illinois Statute. In *Daneff*, the Second Circuit Court of Appeals addressed the classification issue and acknowledged the potential for extreme cases even though it was not shown that Daneff was himself injured by the enforcement of the New York Statute. There was no quantitative analysis and theoretically Daneff could have possessed a pure substance and not be "injured" by the enforcement of the statute. Appellant submits that the question of whether severe inequities prevalent under the previously mentioned Illinois Classification system are acceptable or

tolerable is a substantial question which merits a plenary consideration.

Appellant also raises the question of whether the statute under which he was tried, convicted, and sentenced, is unconstitutionally vague and ambiguous on its face and as applied to him in this case. The focus of this question is how to read the word "knowingly" in the statute when applying it to the facts in the present case.

Section 1401(a) of the Controlled Substance Act (Ill. Rev. Stat. 1973, Ch. 56½, Section 1401) provides:

> . . . it is unlawful for any person *knowingly* to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance. Any person who violates this section with respect to:
>
> (a) the following controlled substances and amount, notwithstanding . . . is guilty of a class 1 felony . . .
>
> (7) 300 grams or more of any substance containing . . . (V.) 3, 4, 5-Trimethoxyphenethylamine (mescaline)
>
> (8) 30 grams or more of any substance containing lysergic acid diethylamide (LSD) . . .
>
> (Emphasis supplied.)

The opinion of the Appellate Court of Illinois (Appendix A) held that in the above statute, the word "knowingly" applies only to the delivery of a controlled substance and that if one knowingly delivers a controlled substance, one is guilty of the offense as specified above and that subsection (a) only becomes relevant with regard to the penalty imposed after conviction.

The appellant submits that in the above statute, the word *knowingly* applies to subsection (a) and to be guilty of a Class One felony, one must knowingly deliver over 30 grams of a substance containing LSD or over 300 grams of a substance containing mescaline etc. or, at

best that the statute is ambiguous and can reasonably be read in more than one way.

Accordingly, Appellant submits that if the statute is ambiguous or can be read differently on its face, it must be read in the manner most beneficial to the accused notwithstanding the intentions of the Illinois legislature. In the instant case, all evidence presented showed that James thought he was delivering Mescaline, not LSD, that in convicting him of knowingly delivering LSD, the statute was not read in the manner most beneficial to the accused, but in a manner most beneficial to the State. Whether this statute is unconstitutionally vague and ambiguous is a substantial question as pertains to the Appellant in this case, since he now faces a four year penitentiary term which would deprive him of four years of freedom and liberty. This is substantial and merits a plenary consideration.

The Appellant contends that this appeal is properly taken from the Appellate Court of Illinois as "the highest court of a State in which a decision could be had" within the meaning of 28 USC Sec. 1257. A case supporting this contention is *Minneapolis, St. Paul and Sault Ste. Marie Railway Company v. Rock*, 279 U.S. 410 (1929). In that case, an Illinois Appellate Court affirmed a Circuit Court judgment and the petitioner applied to the Illinois Supreme Court to have the case certified to it for review but the application was denied. The respondent asserted that the judgment was not one of the highest Court of the State in which a decision could be had and therefore the U.S. Supreme Court lacked jurisdiction. This Court reasoned that it had jurisdiction because under Illinois law a denial of the petition for certiorari in a case where a certificate of importance has not been granted makes the judgment of the Appellate Court final. This court stated at 279 U.S. 412:

> The judgment is reviewable here. "Whenever the highest court of a state by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach." *Williams v. Bruffy*, 102 U.S. 248, 255 26 L. ed 135, 137.

The instant case and the above mentioned case are nearly identical with regard to the relevant facts in that in both cases, Appellate Courts affirmed Circuit Court judgments. In both cases application to appeal was made to the Illinois Supreme Court, both cases involved Federal questions, in both cases the Illinois Supreme Court could have by law, exercised appellate authority and in both cases it declined to review the lower court judgments making the judgments of the Appellate Courts final.

Another case supporting Appellant's contention that this appeal is properly taken from the Appellate Court is *Panhandle Eastern Pipe Line Co. v. Calvert*, 347 U.S. 157, 98 L ed 583, 74 S. Ct 396. In that case, the Appellants were uncertain whether an appeal to the U.S. Supreme Court was properly taken from the Court of Civil Appeals or the Supreme Court of Texas, as "the highest court of a state in which a decision could be had" within the meaning of 28 USC Sec. 1257. Accordingly, the Appellants appealed from each of the courts. The relevant language of this Court at 347 U.S. 160 is as follows:

> We think that appeals in these cases were properly from the Court of Civil Appeals. In American R. Express Co. v. Levee, 263 US 19, 68 L ed 140, 44 S Ct. 11 (1923), the Supreme Court of Louisiana had refused a writ of certiorari to the State Court of

Appeal "for the reason that the judgment is correct." Mr. Justice Holmes, speaking for a unanimous Court, said:

> ". . . [U]nder the Constitutions of the State the jurisdiction of the Supreme Court is discretionary . . . and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no further, . . . when the jurisdiction was declined the Court of Appeal was shown to be the highest court of the State in which a decision could be had. Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining jurisdiction. Western Union Telegraph Co. v. Crovo, 220 US 364, 366. Norfolk & Suburban Turnpike Co. v. Virginia, 225 US 264, 269. Of course the limit of time for applying to this Court was from the date when the writ of certiorari was refused." 263 US, at 20, 21.

The instant case and the language in the above case show similarities with regard to relevant facts. In both, jurisdiction of the State Supreme Court was discretionary, it was necessary to invoke that jurisdiction to insure the case could go no further thus exhausting all state court remedies, and when jurisdiction was declined, the Appellate Courts were the highest court of the State in which a decision could be had. Accordingly, Appellant submits to this Court that this appeal is properly taken from the final judgment of the Appellate Court of Illinois, Second Judicial District, as "the highest court of a state in which a decision could be had" within the meaning of 28 USC Sec. 1257.

CONCLUSION

Appellant submits this Jurisdictional Statement to show that this Court has jurisdiction of this appeal, that this appeal presents substantial Federal questions which should be given plenary consideration, and therefore Appellant prays this Honorable Court to give plenary consideration, with briefs on the merits and oral argument, to resolve these questions.

Respectfully submitted,

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APPENDIX A

38 Ill.App.3d 594
PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

Larry JAMES, Defendant-Appellant.

No. 74-292.

Appellate Court of Illinois,
Second District, First Division.

May 26, 1976.

Defendant was convicted in the Circuit Court, Kane County, Paul W. Schnake, J., of unlawful delivery of a controlled substance containing LSD and he appealed. The Appellate Court, Seidenfeld, P. J., held that where defendant knew he was delivering a controlled substance, he could be convicted of delivering a controlled substance containing LSD even if he may erroneously have thought that the LSD was mescaline; and that the imposition of a nonprobationable four-year minimum sentence did not constitute cruel and unusual punishment or offend the provision of the State Constitution requiring penalty to be determined according to seriousness of the offense.

Affirmed.

1. Constitutional Law—270
Drugs and Narcotics—43

Controlled Substances Act's assessment of penalties on basis of weight of substance containing controlled substance rather than on relative amount of prohibited substance did not violate defendant's due process rights. S.H.S. ch. 56½, § 1401(a)(8).

2. Drugs and Narcotics—70

Where accused knew he was delivering controlled substance, he could be convicted of delivering controlled substance containing LSD even if he erroneously thought that it was mescaline rather than LSD. S.H.A. ch. 56½, § 1401(a)(8).

3. Criminal Law—1213
Drugs and Narcotics—133

Imposition of nonprobationable four-year minimum sentence for offense of unlawful delivery of 30 grams or more of controlled substance containing LSD did not constitute cruel and unusual punishment or violate state constitutional provision requiring penalty to be determined according to seriousness of offense. S.H.A. ch. 56½, § 1401(a); U.S.C.A. Const. Amend. 8; S.H.A. Const. 1970, art. 1, § 11.

4. Criminal Law—1183

Appellate Court may not reduce penitentiary sentence to probation, nor does it have authority to reduce sentence of imprisonment below minimum limit set by legislature in valid enactment. Supreme Court Rules, rule 615, S.H.A. ch. 110A, § 615.

Peter M. Donat, Batavia, for defendant-appellant.

Gerry L. Dondanville, State's Atty., Geneva, Edward N. Morris and Martin P. Moltz, Elgin, for plaintiff-appellee.

SEIDENFELD, Presiding Justice:

Following a jury trial, the defendant was convicted of the offense of Unlawful Delivery of a Controlled Substance containing Lysergic Acid Diethylamide (LSD) in violation of section 401(a)(8) of the Controlled Substances Act of Illinois (Ill.Rev.Stat. 1973, ch. 56½, par. 1401(a)(8)), and sentenced to four years to four years and one day in the penitentiary. He appeals, contending that the Controlled Substances Act is unconstitutional. Alternatively he contends that he was not proven guilty beyond a reasonable doubt of the knowing delivery of the controlled substance and further that the penalty is excessive.

[1] Defendant's argument on constitutional grounds is based upon the reasoning that the concept of assessing penalties on the weight of the substance containing the controlled substance rather than on the relative amount of the prohibited substance violates defendant's due process rights under both the Federal and the State Constitutions. Defendant also challenges the constitutionality of the penalties under section 401(a) which provides that upon conviction of the offense involving thirty grams or more of any substance containing LSD the defendant is guilty of a class 1 felony with the additional requirement of a nonprobationable four year minimum sentence. He argues that this constitutes cruel and unusual punishment under the Eighth Amendment of the Federal Constitution and offends the provision of the Illinois Constitution which requires penalties to be determined according to the seriousness of the offense (Illinois Constitution 1970, Article I, Section 11). The first of these contentions has now been ruled on by the Illinois Supreme Court adversely to defendant's position. See *People v. Mayberry*, 63 Ill.2d 1, 8-10, 345 N.E.2d 97 (1976).

Defendant's argument on the merits of the conviction is two-pronged. First he argues that the word "knowingly" when used in defining a class 1 felony under section 401(a) of the Controlled Substances Act requires that a defendant know the particular controlled substance he is charged with delivering or at least know the nature or potential of the substance in order to fulfill all of the elements of the crime. He then argues that proof does not show beyond a reasonable doubt that defendant knowingly delivered over 30 grams of LSD since he claims that all of the evidence shows that he thought he was selling Mescaline.

It appears from the record that on or about January 21, 1974, an informer, Roger Anderson, introduced Leo DeFranco, a special agent for the Drug Enforcement Administration to the defendant for the purpose of arranging for the buying and selling of narcotic drugs. On January 27, 1974, the defendant gave the informant a free sample of Mescaline to be delivered to DeFranco in anticipation of a later sale. On the following day Anderson gave the sample to DeFranco and advised him that James was willing to sell him 2,000 "hits" of Mescaline for $1,000. A meeting was arranged at which defendant said he had sold 200 hits of Mescaline to someone and that he would sell 100 hits per 2½ grams of Mescaline to the agent. The transaction was consummated and DeFranco received the substance and paid the defendant $900.

After the substance was chemically tested, it was determined that it contained Lysergic Acid Diethylamide (LSD) rather than Mescaline or any other controlled substance.

As previously noted, defendant was indicted and tried for the offense of selling LSD. Section 401(a) of the Controlled Substances Act (Ill.Rev.Stat. 1973, ch. 56½, section 1401) states:

> "* * * it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance. Any person who violates this Section with respect to: (a)

> the following controlled substances and amounts, notwithstanding * * * is guilty of a Class 1 felony * * *. (7) 300 grams or more * * * (v) 3, 4, 5-trimethoxyphenethylamine (mescaline) other than peyote; (8) 30 grams or more of any substance containing lysergic acid diethylamide (LSD). * * *"

The defendant concedes that under the former law which proscribed, among other acts, the sale or possession of any "narcotic drug" it was presumed that one who possessed or controlled a narcotic drug knew its nature (*People v. Pigrenet*, 26 Ill.2d 224, 186 N.E.2d 306 (1962); *People v. Davis*, 33 Ill.2d 134, 210 N.E.2d 530 (1965); *People v. Pugh*, 36 Ill.2d 435, 223 N.E.2d 115 (1967)); but he argues that this presumption does not apply to the Controlled Substances Act because it is differently conceived from the previous legislation. He reasons that under the former law it made no difference what particular kind of narcotic drug a defendant possessed because the same penalties were applicable to any of them; but that when penalties are differentiated as in the Controlled Substances Act by the particular substance possessed (and, for a Class 1 felony, by the weight of the substance containing the controlled substance) there is no foundation for the presumption that possession infers knowledge of the particular drug. He reasons that if we do not require proof of knowledge of the particular substance, an absolute liability offense would result and that this was not intended since "knowingly" would then be a meaningless phrase in the act.

The State responds that "knowingly" must be read in a realistic manner so that if an accused knows he is delivering a controlled substance, he commits the criminal act as specified in the first paragraph of section 401 and that it then becomes a question of proving the nature of the substance and the weight to determine the particular penalty to be applied. We agree.

[2] Section 401 of the Controlled Substances Act says, "* * * it is unlawful for any person knowingly to * * * deliver * * * a controlled substance. * * *." The crim-

inal offense charged against the defendant and for which he was convicted is the knowing delivery of a controlled substance. (See *People v. Kadlec*, 21 Ill.App.3d 289, 296, 313 N.E.2d 522 (1974).) If the accused knows he is delivering a controlled substance, he commits the criminal act specified in the first paragraph of Section 1401, even though he may erroneously have thought that it was Mescaline when in fact it was LSD.

It is not reasonable to assume that the legislature intended that the State prove that the accused knew the exact nature or chemical name of the controlled substance. This would lead to the absurd result, as the State suggests, that drug dealers would only be liable for selling the drug they thought they were selling. This approach would make the statute inapplicable to one who had not personally performed a chemical analysis of the substance containing the controlled substance.

The proof of the nature of the substance containing the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction.

The argument of the defendant that he was not proved guilty beyond a reasonable doubt is based upon his lack of knowledge of the precise nature of the controlled substance. It must therefore fail based upon our conclusion as to the knowledge required for conviction.

Defendant also contends that although he received the minimum sentence provided by statute that we have power to reduce the sentence and should do so and grant probation. He is the first offender with no previous record except for traffic offenses.

While defendant acknowledges the fact that the class 1 felony of which he was convicted is nonprobationable under the statute (Ill.Rev.Stat. 1973, ch. 38, pars. 1005-5-3(d)(1) and 1005-8-1), he characterizes his sentence as cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution and of Section 11 Article I of the Illinois Constitution.

However, the constitutionality of mandatory minimum provisions have been upheld in numerous Illinois cases. (See, e.g., *People v. Koeppen*, 21 Ill.App.3d 478, 481-2, 315 N.E.2d 679 (1974); *People v. Hamann*, 28 Ill.App.3d 737, 329 N.E.2d 32 (1975); *People v. Oestringer*, 24 Ill.App.3d 185, 189-90, 321 N.E.2d 146 (1974).) Statutes which prohibit probation for certain drug offenses have been held not to thereby provide cruel and unusual punishment. See, e.g., *United States v. Martinez*, 481 F.2d 214, 221, cert. den., 415 U.S. 931, 94 S.Ct. 1444, 39 L.Ed.2d 489 (5th Cir. 1975); *United States v. DelToro*, 426 F.2d 181, 183, cert. den., 400 U.S. 829, 91 S.Ct. 58, 27 L.Ed.2d 60 (5th Cir. 1970); *Stewart v. United States*, 325 F.2d 745, 746, cert. den., 377 U.S. 937, 84 S.Ct. 1344, 12 L.Ed.2d 301 (8th Cir. 1964); *State v. White*, 254 La. 389, 223 So.2d 843, 845 (La.1969).

[3] In view of the seriousness of the offense and the evil sought to be alleviated, we cannot conclude that the legislative provision is so unreasonable and arbitrary as to offend either Federal or State constitutional limitations. The trial judge expressed understandable doubts that he would have imposed the statutory minimum if he were given discretion to do otherwise. The result is a hard one given the particular circumstances. We agree, however, that he had no choice.

[4] We are not granted the power under Supreme Court Rule 615 (Ill.Rev.Stat. 1973, ch. 110A, par. 615) to reduce a penitentiary sentence to probation. (*People v. Bolyard*, 61 Ill.2d 583, 587-9, 338 N.E.2d 168 (1975).) Nor do we have authority to reduce a sentence of imprisonment below the minimum limit set by the legislature in a valid enactment. See *People v. Powell*, 9 Ill.App.3d 722, 725, 292 N.E.2d 577 (1973). Cf. *People v. Dudley*, 46 Ill.2d 305, 311, 263 N.E.2d 1 (1970), cert. den., 402 U.S. 910, 91 S.Ct. 1386, 28 L.Ed.2d 651 (1971).

The judgment is therefore affirmed.

Affirmed.

GUILD and HALLETT, JJ., concur.

APPENDIX B

United States of America COPY

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* thirteenth *day of* September *in the year of our Lord, one thousand nine hundred and* seventy-six *, within and for the State of Illinois.*

PRESENT: DANIEL P. WARD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER — JUSTICE ROBERT C. UNDERWOOD

JUSTICE THOMAS E. KLUCZYNSKI — JUSTICE JOSEPH H. GOLDENHERSH

JUSTICE HOWARD C. RYAN — JUSTICE CASWELL J. CREBS

WILLIAM J. SCOTT, ATTORNEY GENERAL

LOUIS F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

FILED
OCT 28 1976
LOREN J. STROTZ, Clerk
Appellate Court, 2nd District [illegible]

Be It Remembered, *that, to-wit: on the* 29th *day of* September 1976 *, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:*

People State of Illinois,
Respondent

No. 48657 vs.

Larry James,
Petitioner

Petition for Leave to Appeal from
Appellate Court
Second District
74-292

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said Court this* 25th *day of* October *, 19* 76.

Clell L. Woods Clerk,
Supreme Court of the State of Illinois.

APPENDIX C

63 Ill.2d 1
The PEOPLE of the State of Illinois, Appellant,

v.

Ricky MAYBERRY, Appellee.

The PEOPLE of the State of Illinois, Appellant,

v.

Michael HURLEY, Appellee.

Nos. 47495, 47640.

Supreme Court of Illinois.

March 18, 1976.

State appealed from orders of the St. Clair County Circuit Court and the Sangamon County Circuit Court, Robert L. Gagen and Simon L. Friedman, JJ., dismissing indictments. The Supreme Court, Crebs, J., held that while the State did not challenge the standing of defendants in the trial court to question the constitutionality of the graduated penalty provisions of the Cannabis Control Act and the Controlled Substances Act, the respective trial courts did in fact consider the issue of standing, there was no indication that defendants refrained from presenting pertinent rebuttal evidence by the State's failure to argue the issue, and the Supreme Court would thus consider the question of standing; that while the possibility existed that the substance delivered by defendant was pure cannabis and the substance delivered by the codefendant was a pure controlled substance, the important fact was that defendants were indicted for the delivery of "substances containing" cannabis and controlled substances and, therefore, they were within the class aggrieved by the

alleged unconstitutionality of the Acts' graduated penalty provisions; that defendants had standing to challenge the constitutionality of the Acts' graduated penalty provisions even though they had not yet been convicted; and that the Acts' classification schemes are not unconstitutional merely because they are based on the amount of the "substance containing" the cannabis or controlled substance rather than upon the pure cannabis or controlled substance.

Reversed and remanded, with directions.

1. Criminal Law—1028

General rule is that a party may not raise a question on appeal which was not properly presented to the trial court.

2. Criminal Law—1028

While the State did not challenge the standing of defendants in the trial court to question the constitutionality of the graduated penalty provisions of the Cannabis Control Act and the Controlled Substances Act, the respective trial courts did in fact consider the issue of standing, there was no indication that defendants refrained from presenting pertinent rebuttal evidence by the State's failure to argue the issue, and the Supreme Court would thus consider the question of standing. S.H.A. ch. 56½, §§ 701 et seq., 1100 et seq.

3. Constitutional Law—42(2)

A party does not have standing to challenge the constitutional validity of a statutory provision if he is not directly affected by it unless the unconstitutional feature is so pervasive as to render the entire act invalid.

4. Constitutional Law—42(2)

A party who attacks a statute as unconstitutional must bring himself within the class aggrieved by the alleged unconstitutionality.

5. Constitutional Law—42.3(1)

While the possibility existed that the substance delivered by defendant was pure cannabis and the substance delivered by the codefendant was a pure controlled substance, the important fact was that defendants were indicted for the delivery of "substances containing" cannabis and controlled substances and, therefore, they were within the class aggrieved by the alleged unconstitutionality of the graduated penalty provisions of the Cannabis Control Act and the Controlled Substances Act. S.H.A. ch. 56½, §§ 701 et seq., 1100 et seq.

6. Constitutional Law—42(2)

One has standing to challenge the validity of a statute if he has sustained or if he is in immediate danger of sustaining some direct injury as a result of enforcement of the statute.

7. Constitutional Law—42.1(3)

Defendants had standing to challenge the constitutionality of the graduated penalty provisions of the Cannabis Control Act and the Controlled Substances Act, under which they were respectively indicted, even though they had not yet been convicted. S.H.A. ch. 56½, §§ 701 et seq., 1100 et seq.

8. Constitutional Law—48(6)

In determining whether a statutory classification violates the equal protection clause, the Supreme Court will presume that the classification is valid and place the burden of showing invalidity on the party challenging the classification.

9. Constitutional Law—208(1)

A classification scheme will be upheld if any state of facts may reasonably be conceived which would justify the classification; it is only required that there be a reasonable basis for distinguishing between the classes created by the legislation.

10. Constitutional Law—250.1(2)
Drugs and Narcotics—43

Classification schemes of the Cannabis Control Act and the Controlled Substances Act are not unconstitutional merely because they are based on the amount of the "substance containing" the cannabis or controlled substance rather than upon the pure cannabis or controlled substance. S.H.A. ch. 56½, §§ 701 et seq., 1100 et seq.

William J. Scott, Atty. Gen., Springfield, and Robert H. Rice, State's Atty., Belleville, and C. Joseph Cavanaugh, State's Atty., Springfield (Tracy W. Resch, Asst. Atty. Gen., of counsel), for the People.

Stephen P. Hurley, Deputy State Appellate Defender, Mt. Vernon (David M. Rothenberg, Ltd. Asst. State Appellate Defender, Collinsville, of counsel), for appellee Ricky Mayberry.

Michael J. Costello, Springfield, for appellee Michael Hurley.

CREBS, Justice.

These are appeals from orders of the circuit courts of Sangamon County and of St. Clair County dismissing indictments against the defendants. Since the issues presented by the cases are virtually identical, the two cases have been consolidated for appeal.

The defendant Michael Hurley was charged in a two-count indictment with two violations of the Cannabis Control Act (Ill.Rev.Stat. 1973, ch. 56½, par. 701 *et seq.*).

The first count of the indictment alleged that the defendant committed the offense of delivery of more than 30 grams but not more than 500 grams of a substance containing cannabis in violation of section 5(d) of the Act (Ill.Rev.Stat. 1973, ch. 56½, par. 705(d)). The second count alleged that the defendant committed the offense of unlawful possession of more than 30 but not more than 500 grams of a substance containing cannabis in violation of section 4(d) of the Act (Ill.Rev.Stat. 1973, ch. 56½, par. 704(d)).

The defendant Ricky Mayberry was charged in separate indictments with three violations of the Illinois Controlled Substances Act (Ill.Rev.Stat. 1973, ch. 56½, par. 1100 *et seq.*). Each indictment charged the defendant with the offense of delivering 200 grams or more of a substance containing a derivative of barbituric acid in violation of section 401(a)(5) of the Act (Ill.Rev.Stat. 1973, ch. 56½, par. 1401(a)(5)).

The circuit court of Sangamon County dismissed the first count of the indictment against Hurley on the ground that the graduated penalty provision of the Cannabis Control Act is unconstitutional. The circuit court of St. Clair County dismissed the three indictments against Mayberry, holding that the graduated penalty provision in the Controlled Substances Act constituted a violation of the due process and equal protection clauses of the United States and Illinois constitutions. Each court held that the relevant act provided for punishment based upon the amount of a "substance containing" cannabis or a controlled substance rather than upon the amount of the pure substance sought to be controlled. The courts held that that classification scheme bore no reasonable relation to the legislative purpose of the acts.

Section 5 of the Cannabis Control Act, the portion of the Act relevant to the first count against Hurley, provides that:

> "It is unlawful for any person knowingly to manufacture, deliver, or possess with intent to

deliver, or manufacture, cannabis. Any person who violates this section with respect to:

(a) not more than 2.5 grams of any substance containing cannabis is guilty of a Class B misdemeanor;

(b) more than 2.5 grams but not more than 10 grams of any substance containing cannabis is guilty of a Class A misdemeanor;

(c) more than 10 grams but not more than 30 grams of any substance containing cannabis is guilty of a Class 3 felony;

(d) more than 30 grams but not more than 500 grams of any substance containing cannabis is guilty of a Class 3 felony;

(e) more than 500 grams of any substance containing cannabis is guilty of a Class 2 felony." (Ill.Rev.Stat. 1973, ch. 56½, par. 705.)

Section 401 of the Illinois Controlled Substances Act, the section under which Mayberry was indicted, provides in relevant part that:

"Except as authorized by this Act, it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance. Any person who violates this Section with respect to:

(a) the following controlled substances and amounts * * * is guilty of a Class 1 felony * * *:

* * * * * *

(5) 200 grams or more of any substance containing a derivative of barbituric acid or any of the salts of a derivative of barbituric acid;

* * * * * *

(d) any other amount of a controlled substance classified in Schedule III is guilty of a Class 3 felony. * * *"

The Cannabis Control Act and the Controlled Substances Act contain other sections with penalty provisions based upon the weight of a mixed substance rather than upon the weight solely of the substance sought to be controlled. (Ill.Rev.Stat. 1973, ch. 56½, pars. 704, 1401, 1402.) Whether this type of classification scheme is violative of the due process or equal protection clauses is the primary issue presented by these appeals.

[1, 2] Before reaching that issue it is necessary to consider the State's contention that the defendants did not have standing to raise the issue in the trial courts. The defendants reply that the State did not challenge their standing in the trial courts and should therefore be barred from raising the issue of standing on appeal. The general rule is that a party may not raise a question on appeal which was not properly presented to the trial court. (*People v. Curry*, 56 Ill.2d 162, 306 N.E.2d 292.) The reasoning behind the rule is that the trial court should have the first opportunity to consider any question that may arise in a case. In the instant cases, however, the trial courts did consider the issue of standing even though the State did not challenge the standing of the defendants. Each court held that the defendant did possess standing to raise the constitutional questions. Also, there is no indication that the defendants were led to refrain from presenting pertinent rebuttal evidence by the State's failure to argue the issue before the trial courts. For these reasons, we will consider the question of standing.

[3-5] A party does not have standing to challenge the constitutional validity of a statutory provision if he is not directly affected by it unless the unconstitutional feature is so pervasive as to render the entire act invalid. (*People v. Palkes*, 52 Ill.2d 472, 288 N.E.2d 469.) A party who attacks a statute as unconstitutional must bring himself within the class aggrieved by the alleged unconstitutionality. (*People v. Bombacino*, 51 Ill.2d 17, 280 N.E.2d 697, *cert. denied*, 409 U.S. 912, 93 S.Ct. 230, 34 L.Ed.2d 173.) The first question raised with respect to the issue of standing is whether the defendants brought themselves within the class of people allegedly

aggrieved by the acts. The acts are alleged to be unfair in those cases in which the cannabis or controlled substance involved is not pure but is mixed with other substances. In those cases, the entire mixed substance is weighed to determine the seriousness of the offense. The State contends that nothing in the record suggests that Hurley was charged with anything but the delivery of pure cannabis or that Mayberry was charged with anything but delivery of pure controlled substances. The possibility that the substance delivered by Hurley may have been pure cannabis and that the substance delivered by Mayberry may have been pure controlled substance, however, does not destroy the defendants' standing to challenge the statutes. The important fact is that Hurley was not indicted for the delivery of cannabis but for the delivery of a "substance containing" cannabis. Mayberry was not indicted for the delivery of controlled substances for the delivery of "substances containing" controlled substances. Thus, to prove the offenses alleged, the State had no burden to prove the quantity of the pure cannabis or pure controlled substances involved. Nor was either defendant charged with the minimum offense under the statutory provisions cited in their respective indictments. Hurley was threatened with the possible conviction of a Class 3 felony if the State could prove that he delivered some substance weighing more than 30 grams and containing any quantity of cannabis. Mayberry faced the possible conviction of three Class 1 felonies if the State could prove that he delivered certain substances exceeding 200 grams in weight which included any quantity of a derivative of barbituric acid. Furthermore, in contrast to the factual circumstances present in several recent appellate court decisions, we note that the defendants in the instant cases have not pleaded guilty to possession or delivery of a pure substance. (See, *e.g.*, *People v. Kline*, 16 Ill.App.3d 1017, 307 N.E.2d 398, *aff'd*, 60 Ill.2d 246, 326 N.E.2d 395, and cases cited therein.) We find that under these circumstances the defendants were within the class aggrieved by the alleged unconstitutionality of the acts.

[6, 7] The State also argues that the trial courts erred in deciding the constitutional issues raised by the defendants because the defendants had not yet been convicted of any crime. Since trials of the defendants conceivably could have rendered the constitutional issues moot, the State asserts that the validity of the penalty provisions should not have been considered prior to entry of judgment following conviction. We find this argument to be without merit. One has standing to challenge the validity of a statute if he has sustained or if he is in immediate danger of sustaining some direct injury as a result of enforcement of the statute. (*Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285.) Once Hurley was indicted, he was in immediate danger of being convicted of a Class 3 felony pursuant to the enforcement of the Cannabis Control Act. When Mayberry was charged with three violations of the Controlled Substances Act, he was in immediate danger of being convicted of three Class 1 felonies pursuant to the enforcement of that act. Each defendant was faced with the necessity of defending against charges which would have been less serious had the penalty provisions complained of not been in existence. We find that the defendants were directly affected by the alleged unconstitutionality of the acts, therefore, and that they had standing to challenge the acts even though they had not yet been convicted.

The defendants contend that the acts are unconstitutional because they include classification schemes which unreasonably discriminate against certain offenders of the acts. The Cannabis Control Act and the Controlled Substances Act classify offenders by providing that an offense becomes more severe as the weight of the substance involved increases. These classifications are not based upon the amount of pure cannabis or controlled substance involved but upon the amount of the substance containing the cannabis or controlled substance. Thus, it can be argued that violators of the acts are in a sense punished for the possession, manufacture or delivery of innocuous substances.

[8-10] In determining whether a statutory classification violates the equal protection clause, we presume that the classification is valid and place the burden of showing invalidity upon the party challenging the classification. A classification scheme will be upheld if any state of facts may reasonably be conceived which would justify the classification. It is only required that there be a reasonable basis for distinguishing between the classes created by the legislation. (*People v. McCabe*, 49 Ill.2d 338, 275 N.E.2d 407.) In *United States ex rel. Daneff v. Henderson*, 501 F.2d 1180 (2d Cir. 1974), the court considered virtually the same issues as those presented in this case. At issue was a New York statute proscribing the possession of dangerous drugs. The statute had a graduated penalty provision similar to the provisions in the Illinois Cannabis Control Act and Controlled Substances Act. The court noted in *Daneff* that dangerous drugs are generally marketed in a diluted or impure state. It was therefore held that it was not unreasonable or irrational for a legislature to deal with the mixture or compound rather than the pure drug. The court went on to state that "[t]he State cannot be expected to make gradations and degrees so fine as to treat all law violators with the precision of a computer." (501 F.2d 1180, 1184.) We find the reasoning of the court in *Daneff* persuasive. Our legislature may have believed that any given amount of drug can be distributed to a greater number of people and thus have a greater potential to be harmful if it is mixed with another substance. While the soundness of that belief may be questionable, the determination is one for the legislature to make, and we cannot find that the classification schemes at issue have no reasonable basis. Also, the defendants have not demonstrated that a classification scheme based upon the amount of the pure drug contained in a given substance would be feasible. We therefore conclude that the classification schemes are not unconstitutional merely because they are based on the amount of the "substance containing" the cannabis or controlled substance rather than upon the pure cannabis or controlled substance.

For the foregoing reasons we reverse the decisions of the circuit courts of Sangamon and St. Clair Counties and remand the causes with directions that the indictments be reinstated.

Reversed and remanded, with directions.

APPENDIX D

UNITED STATES ex rel. Alejandro DANEFF, Appellant,

v.

Robert HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York, Appellee.

No. 1052, Docket 74-1124.

United States Court of Appeals, Second Circuit.

Argued May 14, 1974.

Decided Aug. 7, 1974.

Proceeding on petition by state prisoner for federal habeas corpus relief. The United States District Court for the Southern District of New York, Inzer B. Wyatt, J., denied writ, and prisoner appealed. The Court of Appeals, Oakes, Circuit Judge, held that prisoner, by pleading guilty to violation of state statute, did not thereby waive right to challenge constitutionality of statute, that state was precluded from asserting that prisoner did not have standing to challenge constitutionality of New York statutory scheme, and that such statutory scheme did not deny due process or equal protection and was not unconstitutional on its face when applied to prosecution for possession of eighteen ounces of powder containing cocaine.

Affirmed.

1. Criminal Law—273.4(1)

Petitioner, by pleading guilty to violation of state statute, did not thereby waive right to challenge constitutionality of such statute in federal habeas corpus proceeding. Penal Law N.Y. 1965, § 220.22, Laws 1969, c. 788; U.S.C.A. Const. Amend. 14.

2. Courts—365(3)

While state court determinations of standing are not binding on lower federal courts, considering federal question previously raised in and decided by state courts, state court recognition of standing to raise federal constitutional questions in criminal cases can be persuasive in federal habeas proceedings.

3. Constitutional Law—42.1(3)

In view of accused's inability, under New York law applicable to his conviction of possession of cocaine, to obtain pretrial scientific analysis of powder which accused was convicted of possessing, state was precluded from asserting that accused did not have standing to challenge constitutionality of New York statutory scheme, which imposed penalties for possession of drugs on basis of weight of mixture possessed as opposed to actual content of the dangerous drugs, since amount of cocaine within 18 ounces of powder seized from accused was not shown. Penal Law N.Y. 1965, § 220.22, Laws, 1969, c. 788; CPL N.Y. 240.20; Fed.Rules Crim.Proc. rule 16, 18 U.S.C.A.; U.S.C.A. Const. Amend. 14.

4. Criminal Law—1205

Comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for state's determination.

5. Constitutional Law—250.1(2), 258(3) Drugs and Narcotics—43

New York statutory scheme, which imposed penalties for possession of drugs on basis of weight of mixture possessed as opposed to actual content of the dangerous drugs, did not deny due process or equal protection in that it bore reasonable relationship to imposition of greater punishment on dealers; and such statutory scheme was not unconstitutional on its face when applied to prosecution for possession of 18 ounces of

powder containing cocaine. Penal Law N.Y. 1965, §§ 70.00, 220.05, 220.15, 220.20; §§ 220.22, 220.23, Laws 1969, c. 788; U.S.C.A. Const. Amend. 14.

6. Habeas Corpus—45.3(1)

Habeas corpus claim which was never properly raised before state courts was not within federal court's jurisdiction to decide in proceeding on state prisoner's petition for federal habeas corpus relief.

Abraham Werfel, Jamaica, N.Y., for appellant.

David R. Spiegel, Asst. Atty. Gen. (Louis J. Lefkowitz, Atty. Gen. of N.Y.; Samuel A. Hirshowitz, Asst. Atty. Gen. New York City, of counsel), for appellee.

Before KAUFMAN, Chief Judge, and HAYS and OAKES, Circuit Judges.

OAKES, Circuit Judge:

This appeal is from a denial of a writ of habeas corpus by Judge Wyatt below in a memorandum opinion handed down on October 9, 1973. The relevant facts, as set forth in the district court's opinion, need to be reiterated here.

Appellant was indicted on February 9, 1970, for criminal possession of a dangerous drug in the first degree, a "class A felony" under New York Penal Law § 220.33 (renumbered § 220.23 effective April 24, 1970).[1] That indictment charged appellant with possession of 18 ounces of "light [white] powder" in which there was "cocaine present." It was apparently stipulated in the trial court by the State and appellant's counsel (who is also his counsel on this appeal) that "cocaine was present

[1] The statutes herein involved were repealed and replaced by a new statutory scheme effective September 1, 1973.

in each" of the two bags in which the 18 ounces of powder were found. No chemical analysis—other than that detecting the presence of *some* cocaine in the white powder—was performed to determine the "purity" of the 18-ounce mixture, that is, the extent of cocaine present. Appellant at no time requested or moved to have such a test made, but he did demur to the indictment on April 20, 1970, on the same grounds of unconstitutionality of the underlying statutory scheme advanced here, a motion which was in due course denied. In an apparent plea bargain appellant pleaded guilty on September 22, 1970, of violation of Penal Law § 220.22, a class B felony. The record shows tha. appellant raised before the trial court—by motion in arrest of judgment—and before all possible appellate courts, including by petition for certiorari to the United States Supreme Court, the fourteenth amendment argument he advances here, to no avail. People v. Daneff, 37 A.D.2d 917, 325 N.Y.S.2d 902 (1971) (conviction aff'd without opinion), aff'd mem., 30 N.Y.2d 793, 334 N.Y.S.2d 897, 286 N.E.2d 273, motion to amend granted, 31 N.Y.2d 667, 336 N.Y.S.2d 903, 288 N.E.2d 805 (1972), cert. denied, 410 U.S. 913, 93 S.Ct. 977, 35 L.Ed.2d 276 (1973). There is no question that appellant exhausted all available state remedies and that his petition was properly before the court below.

I. *"Waiver" and "Standing"*

Before proceeding to the merits of appellant's claim, it is necessary to consider whether he has "standing" to raise the claim he makes in this habeas petition.

[1] A. *The Guilty Plea.* The State argues that appellant by knowingly and voluntarily pleading guilty to a violation of § 220.22, "waived" any right he otherwise would have had to challenge the constitutionality of the statutes under which he was convicted. A similar contention was carefully considered and flatly rejected by this court in United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974). The fact that certiorari was granted on the State's petition, 417 U.S.

967, 94 S.Ct. 3170, 41 L.Ed.2d 1138 (1974) (No. 73-1627), does not deprive *Newsome* of precedential value for us. The State argues that *Newsome* is distinguishable in that the attack made there was "collateral" to the main question preserved on appeal—that of the refusal of the trial court to suppress certain evidence. Here, the State argues, there is no other such issue, and the attack goes to the "heart" of the guilty plea itself. The short answer to the State's contention is that the appellate courts of New York including the New York Court of Appeals, implicitly rejected this argument of the State by themselves considering and rejecting appellant's constitutional claim *on the merits*. Thus, the State's contention reduces to the proposition that appellant's guilty plea, while it did not preclude him from raising his constitutional claim in the state appellate courts, should be read to prevent his raising the same claim on federal habeas corpus. This argument was rejected in *Newsome*, 492 F.2d at 1170-1171, and we reject it here.

B. *The "Purity" Question.* The court below raised, without deciding, the question whether appellant had "standing" to challenge the statutes under which he was convicted. We note at the outset that appellant does not simply attack the constitutionality of the statute, § 220.-22, under which he pleaded guilty and was convicted. Rather, he, in essence, attacks as violative of the due process and equal protection clauses of the fourteenth amendment the entire statutory scheme of New York which imposes penalties for possession of various drugs, including cocaine, on the basis of the weight of the mixture possessed as opposed to the actual content of the dangerous drugs themselves.[2] Appellant's claim

[2] Under § 220.05, the possession of *any* quantity of a "dangerous" drug is a class A misdemeanor, punishable—as a first offense—by a maximum penalty of imprisonment for one year. Under § 220.15, possession of "preparations, compounds, mixtures or substances," containing a drug, of an aggregate weight of less than one ounce but at least ⅛ ounce is punishable as a class D felony. Under § 220.20, possession of

(Footnote continued on following page)

throughout, most simply put, is that there is no rational basis for this statutory scheme which assesses punishment on the basis of the possession of a quantity of "mixture" without regard to the actual quantity of the dangerous drug present in that mixture. One of several examples offered by appellant is that a person in possession of 54 grains of pure cocaine—one grain less than ⅛ ounce—would, if convicted, be subject to punishment as a misdemeanant, whereas one possessing the same 54 grains of cocaine mixed together with 16 ounces of milk sugar or other diluent would be subect to punishment as a class A felon.

[2, 3] The State argues here, and the court below was concerned by the fact, that nowhere in the record does it appear as to how much cocaine, by weight, was present in the 18 ounces of "white powder" which was seized while in appellant's possession. Thus, the State contends, we must assume for purposes of this appeal that, in light of the guilty plea, the mixture seized could have contained, at least theoretically, 18 ounces of pure cocaine. Assuming this *arguendo*, appellant's attack on the statutes would be of no avail *to him* because, the argument runs, reading the statutes to punish on the basis of quantity of drug rather than quantity of mixture possessed results in appellant's still being amenable to punishment as a class A felon. In other words, assuming appellant was carrying pure cocaine, he was not "injured" by the enforcement of the statutes himself. Before reaching the merits of this argument, we note that none of the state appellate courts passing on Daneff's claim ever remotely suggested that Daneff did not have "standing" in this sense to raise his claim. While state-court determinations of standing are not

[2] *continued*
such a "mixture" of less than eight ounces but at least one ounce is punishable as a class C felony. Under § 220.22, possession of a "mixture" of less than 16 ounces but at least eight ounces is punishable as a class B felony. Under § 220.23, possession of a "mixture" of 16 ounces or more is punishable as a class A felony, with a sentence of life imprisonment being possible under § 70.00.

binding on the lower federal courts considering federal questions previously raised in and decided by state courts, *cf.* Coleman v. Miller, 307 U.S. 433, 466, 59 S.Ct. 972, 83 L.Ed. 1385 (1939) (Frankfurter, J., concurring), it also seems to us that state-court recognition of standing to raise federal constitutional questions in criminal cases might well be particularly persuasive in federal habeas proceedings. If the State considers one of its citizens sufficiently "injured" by the operation of a state statute to pass on that citizen's claim of injury, then the additional *federal* requirements that the claim be fairly presented to the state courts in the first instance, Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971), should serve to ensure that only genuine claims are presented and decided.

The State claims that the burden was on appellant to introduce evidence as to the amount of pure cocaine present in the 18 ounces of white powder seized. This argument would have greater force if the provisions of N.Y.C.P.L. § 240.20, permitting rather broad discovery along the lines of Fed.R.Crim.P. 16, had been in effect prior to appellant's conviction.[3] But appellant's failure or omission to move for inspection and scientific analysis before pleading can well be explained by the very narrow view of permissible defense discovery taken over the years by the New York courts in the exercise of their general supervisory powers and absent the express liberalizing statute now embodied in C.P.L. § 240.20. *E.g.*, People ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 33-34, 156 N.E. 84 (1927). *See* Practice Commentary

[3] The provisions of C.P.L. § 240.20, effective Sept. 1, 1971, were rather broadly construed in People v. Johnson, 68 Misc. 2d 708, 327 N.Y.S.2d 690 (Dutchess Cty.Ct. 1971) (Aldrich, J.), but not so broadly as to permit the defense to obtain pretrial scientific analysis of a seized drug in People v. Goetz, 352 N.Y.S.2d 829, 832-833 (Dutchess Cty.Ct. 1974) (Aldrich, J.). The reasoning of *Goetz* appears open to question in an appropriate case, however, *see* United States v. Reid, 43 F.R.D. 520 (D.Ill. 1967), and there are other favorable decisions permitting scientific testing by a defendant under Fed.R.Crim.P. 16. *E.g.*, United States v. Acarino, 270 F.Supp. 526 (S.D.N.Y. 1967).

to C.P.L. art. 240, at 465-466 (McKinney 1971). By what we must consider the appellant's inability to obtain pretrial scientific analysis of the drug in question under the New York law applicable to the conviction here in question, the State must be deemed precluded from assertion of the "standing" argument here.

II. *The Merits*

The thrust of Daneff's equal protection and due process claim is that the sentencing scheme established for possessors of dangerous drugs creates inherently unequal, and indeed irrational, treatment of offenders who are guilty of what he contends are identical offenses. Under the New York statutes, the possession of a given amount of pure cocaine (or heroin or marijuana or other drug) and the possession of the same amount of cocaine (or other drug) mixed with various amounts of diluent are viewed as different offenses, the latter carrying heavier sanctions (the sanction varying with the quantities involved). Our inquiry under both fourteenth amendment claims is here the same: under the equal protection clause we must only ascertain whether there is a rational basis for the classifications drawn by the New York legislature, McGinnis v. Royster, 410 U.S. 263, 270, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973), the very same inquiry to be made under the due process clause. We think there is such a basis.

Appellant's argument, and a very skillful one it is, may be more fully stated as follows. The statutes differentiate in terms of sanction between persons who possess the same amount of *narcotic* substance on the basis of the amount of inert or non-narcotic substance or material with which the narcotic is commingled. As a matter of common knowledge he points out that heroin is generally received in the United States in an 80 to 90 per cent pure state, then "cut" perhaps several times to reach the user in a state of 77 per cent or under "purity." Cocaine or, more accurately, cocaine hydrochloride, is marketed, as evidenced by, *e.g.*, Turner v. United States, 396 U.S. 398, 401, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), in a mixture often containing as low

a percentage as 5 per cent or less of the narcotic. To treat the possessor of 54 grains of pure cocaine only as misdemeanant and one who possessed that quantity mixed in 18 ounces of powder a class A felon, he argues hypothetically, is wholly irrational. And he answers the suggestion that possession of the larger quantity of mixture is an indication of likelihood or potentiality of the possessor's being a seller or distributor and of the scale on which he might operate as such by pointing out not only that the statutes here involved (and offense charged) relate only to possession and not sale or transfer and, indeed, the New York legislature deliberately eliminated any "presumption of sale" from the possession of larger quantities of narcotics. *See* § 1751, N.Y. Penal Law (repealed).

[4] But appellant's argument proves both too much and too little. Too much, in the sense, that, by accepting appellant's own premise that narcotics such as heroin and cocaine are generally marketed in mixtures or compounds, it does not seem unreasonable or irrational for a legislature to deal realistically with the marketing of the mixture or compound rather than the handling of the pure narcotic. Too little, in the sense that while it may not be wise to let the possessor of the pure or a purer product escape with a lighter penalty than that going to the possessor of the drug in its ordinary marketable form, it is not necessary for a legislature to attempt to eradicate all evil, but only part of it; as the Court said in Pennsylvania v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937), "The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the state's] determination."

[5] No doubt the New York legislature, when it adopted the statutory scheme here in question in 1965, had in mind a more flexible pattern of handling drug offenses than that used by the United States[4] or other

[4] *See, e.g.*, United States v. Haynes, 398 F.2d 980, 987 (2d Cir. 1968) (federal narcotics laws draw no distinctions based on quantity of heroin in substance or total quantity of mixture).

states at that time, considering that possessors of greater quantities of drugs should be punished more seriously because they are more likely to be dealers or to be capable of becoming such than possessors of smaller quantities, or because the greater quantitites present a greater threat to society. Certainly to this extent the legislation cannot be treated as irrational. Taking the additional knowledge that heroin and cocaine at least are generally marketed in a diluted or impure state, the rationale of striking at the mixture or compound rather than at the pure quantity involved becomes evident: the possessor of 50 "bags" of five per cent pure heroin should arguably be punished no differently from a possessor of 50 bags with 10 per cent pure heroin. The State cannot be expected to make gradations and differentiations and draw distinctions and degrees so fine as to treat all law violators with the precision of a computer; at the time the New York scheme of punishment was initially proposed in the mid 1960's, it represented probably the most advanced thinking in the country on the difficult and complex question of penalizing trafficking in narcotic drugs in an urban society.

To be sure appellant has put to us some extreme cases where literal application of the statutes could cause some rather remarkably unjust results, particularly with the new (but for purposes of this case irrelevant) New York statute making conviction of a class A-1 drug felony subject to a mandatory life sentence. One such example relates to the use of methadone, where a daily dose in methadone programs may consist of two tablets weighing 80 milligrams or the same substance in a two-ounce juice mixture. To the extent these extreme cases are not themselves handled by prosecutorial discretion,[5] the rulings of the New York courts, or the exercise of

[5] *See* N.Y. times, June 19, 1974, at 1, col. 2 (city ed.) (certain New York prosecutors agree to prosecute "low-level" methadone offenders under the misdemeanor sections of the New York statutes to assure "humane and rational dispositions" for reformed heroin addicts).

more perspicacious legislative insight, we leave their resolution to the day they are presented to us. Suffice it to say in the case of heroin and cocaine possession offenses we do not view the New York statutes that were applied in this case unconstitutional on their face.[6]

[6] Appellant's argument under the eighth amendment's prohibition of cruel and unusual punishment, to the extent that it duplicates his argument under the fourteenth, is rejected for the same reasons as is his equal protection or due process claim, again leaving any questions under the 1973 revision of the New York statutes unanswered. To the extent that this eighth amendment claim is independent of the fourteenth amendment claims, it was apparently never properly raised before the state courts and is therefore not within our jurisdiction to decide. Picard v. Connor, *supra*.

Affirmed.

[6] So, too, we leave until another day any determination with reference to the 1973 New York statutes which, *inter alia*, escalated the penalty for possession and sale in relation to the quantity of drug mixture involved. *See* N.Y. Penal Law, art. 220, Hechtman. Supp. Practice Commentary 6 (1973-74 Cum. Ann.Pkt.Pt.).

APPENDIX E

ARTICLE IV. VIOLATIONS AND PENALTIES

1401. Manufacture or delivery unauthorized by Act—Penalties.] § 401. Except as authorized by this Act, it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance. Any person who violates this Section with respect to:

(a) the following controlled substances and amounts, notwithstanding any of the provisions of subsections (b), (c), (d) or (e) to the contrary, is guilty of a Class 1 felony for which an offender may not be sentenced to death. The fine for violation of this subsection (a) shall not be more than $200,000:

(1) 30 grams or more of any substance containing heroin;

(2) 30 grams or more of any substance containing cocaine;

(3) 30 grams or more of any substance containing morphine;

(4) 1,000 grams or more of any substance containing peyote;

(5) 200 grams or more of any substance containing a derivative of barbituric acid or any of the salts of a derivative of barbituric acid;

(6) 200 grams or more of any substance containing amphetamine or methamphetamine or any salt of an optical isomer of amphetamine or methamphetamine;

(7) 300 grams or more of any substance containing any of the following substances, their salts, isomers and salts of isomers:

(i) diethyltryptamine (DET);
dimethyltryptamine (DMT);
psilocybin (psilocibin, O-phosphoryl-4-hy-

droxy-N, N-dimethyltryptamine); or psilocyn (psilocin, 4-hydroxy-N, N-dimethyltryptamine);

(ii) N-ethyl-3-piperidyl benzilate (JB 318); N-methyl-3-piperidyl benzilate (JB 336);

(iii) 1-(1-Phenylcyclohexl)-piperidine (Phencyclidine, PCP);

(iv) 3, 4, 5-trimethoxyamphetamine (TMA); 4-methyl, 2, 5-dimethoxyamphetamine (DOM, STP); 3, 4-methylenedioxy-amphetamine (al--pha-methyl, 3, 4-methylenedioxyphenethylamine, methylenedioxyamphetamine, MDA); or 3-methoxy-4, 5-methylenedioxyamphetamine (MMDA);

(v) 3, 4, 5-trimethoxyphenethylamine (mescaline) other than peyote;

(8) 30 grams or more of any substance containing lysergic acid diethylamide (LSD).

(b) any other amount of a controlled substance classified in Schedules I or II which is a narcotic drug is guilty of a Class 2 felony. The fine for violation of this subsection (b) shall not be more than $25,000;

(c) any other amount of a controlled substance classified in Schedule I or II which is not a narcotic drug is guilty of a Class 3 felony. The fine for violation of this subsection (c) shall not be more than $20,000;

(d) any other amount of a controlled substance classified in Schedule III is guilty of a Class 3 felony. The fine for violation of this subsection (d) shall not be more than $15,000;

(e) any other amount of a controlled substance classified in Schedule IV is guilty of a Class 4 felony. The fine for violation of this subsection (e) shall not be more than $10,000;

(f) any other amount of a controlled substance classified in Schedule V is guilty of a Class 4 felony. The fine for violation of this subsection (f) shall not be more than $5,000.
Amended by P.A. 77-2733, § 1, eff. Jan. 1, 1973.

APPENDIX F

IN THE APPELLATE COURT
OF ILLINOIS
SECOND JUDICIAL DISTRICT

LARRY JAMES,

Defendant-Appellant,

v.

THE STATE OF ILLINOIS,

Plaintiff-Appellee.

People v. Larry James
Supreme Court of Illinois No. 48657
Appellate Court of Illinois No. 74-292
Second Judicial District
Circuit Court of Kane County No. 74 CF 13892

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that LARRY JAMES, the Appellant above named, hereby appeals to The Supreme Court of The United States from the final order and judgment of the Appellate Court of Illinois, Second Judicial District, entered on the 26th day of May, 1976, and that The Supreme Court of The State of Illinois on the 29th day of September, 1976, entered an order denying Appellant's leave to appeal from the above mentioned judgment of The Appellate Court of Illinois.

This appeal is taken pursuant to 28 USC Section 1257 (2).

Appellant was convicted of the crime of unlawful delivery of a controlled substance in the Circuit Court of Kane County, Illinois, in violation of Illinois revised Statutes, 1973, Chapter 56½, Section 1401 (a); was sentenced to four years to four years and one day in the Illinois Department of Corrections; and is presently not in custody but on an appeal bond posted with the Circuit Court of Kane County, Illinois, in the amount of $5,-000.00.

Appellant's attorneys on appeal and address to which notices shall be sent:

ANTHONY F. DONAT
PETER M. DONAT
DONAT & DONAT
150 West Houston Street
Batavia, Illinois 60510

II.

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of The Supreme Court of The United States, and especially including in said transcript, the following:

1. The Common Law Record.
2. The Transcript or Report of Proceedings.
3. The Abstract of Record in The Appellate Court of Illinois, Second Judicial District.
4. The briefs and reply brief in The Appellate Court of Illinois, Second Judicial District.
5. The Petition for Leave to Appeal in The Supreme Court of Illinois.
6. The docketing of the cause in The Supreme Court of Illinois and order denying Appellant leave to appeal.

III.

The following questions are presented by this appeal.

1. Whether the statute under which the Appellant was tried, convicted and sentenced is repugnant to the equal protection and due process clauses of the Constitution of The United States on its face and as applied to the Appellant.
2. Whether the statute under which the Appellant was tried, convicted and sentenced is unconstitutionally vague and ambiguous on its face and as applied to the Appellant.

(Signed) Anthony F. Donat

(Signed) Peter M. Donat
Attorneys For Appellant

PROOF OF SERVICE

I, PETER M. DONAT, hereby certify that on the 9th day of December, 1976, I served copies of the foregoing Notice of Appeal to The Supreme Court of The United States on the attorneys and offices listed below:

1. The State's Attorney of Kane County, Illinois, by personally delivering a copy of the same to an Assistant State's Attorney in the office of The Kane County State's Attorney, said office located at the Kane County Courthouse, Geneva, Illinois.
2. The Illinois State's Attorneys Association Statewide Appellate Assistance Service by personally delivering a copy of the same to a staff attorney in the office of the Illinois State's Attorneys Association Statewide Appellate Assistance Service, said office located at 35 Fountain Square Plaza, Elgin, Illinois.
3. The Attorney General of Illinois, by mailing a copy of the same in a duly addressed envelope, with first class postage, prepaid and return receipt requested to:

Office of William J. Scott
Attorney General of Illinois
Criminal Appeals Division
Springfield, Illinois

Office of William J. Scott
Attorney General of Illinois
Criminal Appeals Division
Chicago, Illinois

/s/ Peter M. Donat

SUBSCRIBED AND SWORN TO BEFORE ME AT BATAVIA, ILLINOIS, THIS 9th DAY OF DECEMBER, 1976.

(SEAL) JoAnn Hogan
NOTARY PUBLIC

ACKNOWLEDGMENT OF SERVICE

I, DONALD C. HUDSON, Assistant State's Attorney of Kane County hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to The Supreme Court of The United States, this 9th day of December, 1976.

/s/ Donald C. Hudson

ACKNOWLEDGMENT OF SERVICE

I, PHYLLIS J. PERKO, a Staff Attorney of The Illinois State's Attorneys Association Statewide Appellate Assistance Service hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to The Supreme Court of The United States, this 9th day of December, 1976

/s/ PHYLLIS J. PERKO